GREAT EASTERN LIFE ASSURANCE (MALAYSIA) BERHAD

v.

SIU YAN TAM & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
MAH WENG KWAI JCA
[CIVIL APPLICATIONS NO: W-02(NCVC)(W)-318-02-2013
& W-02(NCVC)(W)-243-01-2013]
6 MARCH 2014

CIVIL PROCEDURE: *Appeal - Finding of facts - Finding by trial judge that evidence insufficient to prove fraud, forgery and falsification of signature - Whether appellate court could countenance otherwise*

INSURANCE: *Life insurance - Payment of sum assured - Whether insurance monies paid out to wrong person - Insured person making claim on life insurance policy based on major illness defined under policy - Insured person passed away before receiving payment - Whether insurer correct in releasing policy monies to trustee of policy and insured's executor - Whether policy monies should have been paid to nominees/beneficiaries under policy*

INSURANCE: *Life insurance - Payment of sum assured - Locus standi - Wife removed as nominee under husband's life insurance policy - Whether wife beneficiary of husband's estate - Whether wife had locus standi to commence action against insurer in relation to husband's policy monies*

INSURANCE: *Life insurance - Policy - Fraud - Whether change of trustee of life insurance policy done fraudulently - Whether insured person's signature forged or falsified*

On 20 May 1998, the late James Swee Lee Kong ('the deceased') purchased an insurance policy ('the policy') from Great Eastern Life Assurance Malaysia Bhd ('GE'). Tam, the widow of the deceased was named as the original nominee of the policy. The deceased executed his last will and testament on 25 May 2009 and appointed his brother Collin as the executor and trustee of the will. The deceased's two sons were the only two beneficiaries

under the will. On 13 March 2010, the deceased fell ill with acute myeloid leukaemia and was admitted to hospital. The illness was a 'major illness' defined under the policy. A day after his discharge from hospital, the deceased on 12 April 2010 appointed Collin as the co-trustee of the policy *vide* the appointment/change of trustee form and substituted his two sons as the new nominees in place of Tam *vide* the appointment/change of nominee form. On 28 April 2010, the deceased made a claim on his policy arising from his illness. The deceased passed away on 29 May 2010. On 2 June 2010, Tam notified GE of the death of the deceased. The deceased's living assurance claim was duly processed and approved by GE and on 16 June 2010, notwithstanding the notification of the death of the deceased, GE issued a cheque dated 16 June 2010 for the sum of RM268,248.66 being the benefits under the policy payable in the name of the deceased. On 18 June 2010, Collin as trustee of the policy and as executor and trustee of the will collected the cheque from GE without the knowledge of Tam. However, even though he was supposed to clear the cheque and credit the benefits towards the assets of the estate of the deceased or pay to the deceased's two sons, Collin utilised the money purportedly to reimburse himself for the medical expenses incurred by him on behalf of the deceased after the deceased was taken ill. On 24 May 2011, Tam filed the writ of summons and statement of claim against GE, Collin and the solicitor who witnessed the deceased signing the change of trustee form and the change of nominees form. Tam claimed for the benefits of the policy and damages from GE for having negligently issued the cheque in the name of the deceased and against Collin for having forged the change of trustee form and the change of nominees form and the LAC form with the assistance of the solicitor and fraudulently submitting the claim to GE. GE claimed for indemnity and contribution against Collin in the event GE was held liable to Tam. The trial judge found GE negligent in issuing the cheque for the benefits under the policy in the name of the deceased after it had been notified that the deceased had passed away. GE was ordered to pay the benefits under the policy to Tam. Collin was held 50% liable and was ordered to pay half of the amount ordered against GE. However, the trial judge found that there was insufficient evidence adduced to prove fraud and forgery against Collin and the solicitor. Tam's claim against Collin and the solicitor was accordingly dismissed. Hence the present appeal by GE and Collin.

Held (allowing both appeals with no order as to costs)
Per Mah Weng Kwai JCA delivering the judgment of the court:

(1) The trial judge came to the conclusion as a matter of fact and law that there was insufficient evidence to conclude that Collin had committed fraud, forgery and falsification of the deceased's signature. Tam had not cross appealed against the decision of the trial judge when concluding that Collin was not guilty of fraud, forgery and falsification of the deceased's signature. Hence, it was not open for the Court of Appeal in its appellate jurisdiction to countenance otherwise. (paras 28, 29 & 32)

(2) It was contradictory for the trial judge to say that while fraud and forgery had not been proven conclusively against Collin, yet it was proved on a balance of probabilities that the change of trustee form and the change of nominees form were not signed by the deceased on 12 April 2010 on the ground that he was too ill to have done so. Tam had failed to prove on a balance of probabilities that the two change forms were invalid. (para 32)

(3) The living assurance claim submitted on behalf of the deceased during his lifetime did not 'convert' to a death claim just because payment of the benefits under the policy was made only after the deceased had passed away and that the deceased could not have possibly used the benefits personally. The deciding factor in point of time was when the living assurance claim was made and not when the benefits were paid out. The fact that GE was informed of the death of the deceased before payment of the benefits did not change the character and nature of the living assurance claim which was a claim payable upon confirmation of a specified illness. In a claim for major illness the 'beneficiary' of the benefits of the policy was the deceased himself and not Tam as the original nominee or the deceased's sons as the substituted nominees or the estate of the deceased. (para 35)

(4) Since Tam had been removed as the nominee, she could not have any basis or locus at all to commence this action against GE and Collin. Further, whether or not Collin was properly and/or lawfully appointed as a co-trustee of the policy was of no consequence to Tam as she had been removed as the original nominee by the deceased. (para 36)

(5) Collin could not be held contributorily negligent at all since GE was not liable to Tam in negligence in the first instance. There was thus no question of any indemnity or contribution to be made against Collin. (para 56)

Obiter

(1) GE on becoming aware of a claim by Tam ought to have filed interpleader proceedings to determine the payment of the benefits of the policy to the rightful party. This course of action may have pre-empted any payment to Collin and would have avoided a lengthy trial. (para 60)

Bahasa Malaysia *Translation Of Headnotes*

Pada 20 Mei 1998, mendiang James Swee Lee Kong ('si mati') telah membeli polisi insurans ('polisi tersebut') daripada Great Eastern Life Assurance Malaysia Bhd ('GE'). Tam, balu kepada si mati telah dinamakan sebagai penama asal dalam polisi tersebut. Si mati telah melaksanakan wasiat terakhirnya pada 25 Mei 2009 dan melantik saudara lelakinya Collin sebagai wasi dan pemegang amanah kepada wasiat. Hanya dua orang anak lelaki si mati yang menjadi benefisiari-benefisiari di bawah wasiat. Pada 13 Mac 2010, si mati jatuh sakit akibat myeloid leukaemia kritikal dan dimasukkan ke dalam hospital. Penyakit tersebut merupakan 'penyakit berat' yang ditakrifkan di bawah polisi. Sehari selepas keluar dari hospital, si mati melantik Collin sebagai pemegang amanah bersama bagi polisi tersebut melalui pelantikan/penukaran borang pemegang amanah dan menggantikan dua orang anak lelakinya sebagai penama-penama baru menggantikan Tam melalui pelantikan/penukaran dalam borang penama. Pada 28 April 2010, si mati membuat tuntutan ke atas polisinya berikutan penyakitnya. Si mati meninggal dunia pada 29 Mei 2010. Pada 2 Jun 2010, Tam memaklumkan GE akan kematian si mati. Tuntutan jaminan hidup si mati diproses dan diluluskan oleh GE dan pada 16 Jun 2010, menolak tepi makluman mengenai kematian si mati, GE mengeluarkan cek bertarikh 16 Jun 2010 bagi jumlah RM268,248.66 sebagai manfaat-manfaat di bawah polisi yang boleh dibayar di bawah nama si mati. Pada 18 Jun 2010, Collin sebagai penama polisi dan pelaksana serta pemegang amanah mengambil cek daripada GE tanpa pengetahuan Tam. Walau bagaimanapun, walaupun dia sepatutnya menunaikan cek tersebut dan mengkreditkan manfaat-manfaat tersebut kepada aset-aset estet si mati atau membayar dua orang anak si mati, Collin menggunakan

wang terebut untuk membayar ganti dirinya bagi perbelanjaan perubatan yang dikenakan terhadapnya bagi pihak si mati selepas si mati jatuh sakit. Pada 24 Mei 2011, Tam memfailkan writ saman dan penyata tuntutan terhadap GE, Collin dan peguamcaranya yang menyaksikan pemeteraian si mati bagi penukaran borang pemegang amanah dan penukaran borang penama-penama. Tam menuntut manfaat di bawah polisi dan ganti rugi daripada GE kerana telah mengeluarkan cek secara cuai di bawah nama si mati dan terhadap Collin kerana memalsukan penukaran borang penama dan penukaran borang penama-penama dan borang LAC dengan bantuan peguamcaranya dan secara penipuan, menyerahkan tuntutan tersebut kepada GE. GE menuntut bagi indemniti dan sumbangan terhadap Collin sekiranya GE diputuskan bertanggungan terhadap Tam. Hakim bicara memutuskan bahawa GE cuai dalam mengeluarkan cek bagi manfaat di bawah polisi di bawah nama si mati selepas ia telah dimaklumkan bahawa si mati telah meninggal dunia. GE diperintahkan membayar manfaat-manfaat di bawah polisi kepada Tam. Collin bertanggungan sebanyak 50% dan diperintahkan untuk membayar separuh daripada jumlah yang diperintahkan terhadap GE. Walau bagaimanapun, hakim bicara memutuskan bahawa tidak terdapat keterangan yang mencukupi untuk membuktikan penipuan dan pemalsuan terhadap Collin dan peguamcaranya. Tuntutan Tam terhadap Collin dan peguamcaranya ditolak. Oleh itu, rayuan ini oleh GE dan Collin.

Diputuskan (membenarkan kedua-dua rayuan tanpa perintah terhadap kos)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara memutuskan bahawa sebagai perkara fakta dan undang-undang tidak terdapat keterangan yang mencukupi untuk memutuskan bahawa Collin telah melakukan penipuan dan pemalsuan tandatangan si mati. Tam tidak merayu balas terhadap keputusan hakim bicara dalam memutuskan bahawa Collin tidak bersalah bagi penipuan dan pemalsuan tandatangan si mati. Oleh itu, tidak terbuka kepada Mahkamah Rayuan dalam bidang kuasa rayuannya untuk menyokong yang sebaliknya.

(2) Adalah bercanggah bagi hakim bicara untuk mengatakan bahawa penipuan dan pemalsuan tidak dibuktikan secara muktamad terhadap Collin, tetapi ia telah dibuktikan atas

imbangan kebarangkalian bahawa penukaran borang pemegang amanah dan penukaran borang penama-penama tidak ditandatangani oleh si mati pada 12 April 2010 atas alasan bahawa dia terlalu lemah untuk berbuat sedemikian.

(3) Tuntutan jaminan hidup yang diserahkan bagi pihak si mati semasa hayatnya tidak 'menukarkan' tuntutan kematian hanya kerana bayaran bagi manfaat di bawah polisi hanya dibuat selepas si mati telah meninggal dunia dan bahawa si mati tidak mungkin menggunakan manfaat-manfaat tersebut secara peribadi. Faktor pemutusan masa adalah semasa tuntutan dibuat dan bukan semasa manfaat-manfaat tersebut dibayar. Fakta bahawa GE dimaklumkan mengenai kematian si mati sebelum bayaran manfaat-manfaat tidak menukar sifat tuntutan jaminan hidup yang mana merupakan tuntutan yang boleh dibayar semula apabila penyakit tertentu telah disahkan. Dalam tuntutan bagi penyakit yang berat, benefisiari bagi manfaat-manfaat polisi adalah si mati sendiri dan bukan Tam kerana penama asal atau anak-anak lelaki si mati sebagai penama-penama gantian atau estet si mati.

(4) Oleh kerana Tam telah dikeluarkan daripada menjadi penama, dia tidak mempunyai asas atau *locus* sama sekali untuk memulakan tindakan ini terhadap GE dan Collin. Selanjutnya, sama ada atau tidak Collin benar-benar dan/atau secara sahnya dilantik sebagai pemegang amanah bersama polisi bukanlah menjadi akibat untuk Tam kerana dia telah dikeluarkan daripada menjadi penama asal oleh si mati.

(5) Collin tidak boleh diputuskan sebagai menyumbang kepada kecuaian sama sekali kerana GE tidak bertanggungan kepada Tam dalam kecuaian pada asalnya. Tiada persoalan mengenai indemniti atau sumbangan yang dibuat kepada Collin.

Obiter

(1) GE, apabila maklum mengenai tuntutan Tam sewajarnya memfailkan prosiding interplider untuk memutuskan bayaran manfaat-manfaat polisi kepada pihak yang sepatutnya. Tindakan ini mungkin menghalang sebarang bayaran kepada Collin dan akan mengelakkan perbicaraan yang panjang.

Case(s) referred to:

Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Legislation referred to:

Insurance Act 1996, s. 166(2)

(Civil Application No: W-02(NCVC)(W)-318-02-2013)

For the appellant - Mark Lau (Tan Cheng Leong with him); M/s Sreenevasan Young

For the 1st respondent - K Murali; M/s SN Nair & Partners

For the 2nd respondent - Ringo Low (Ting Lee Ping with him); M/s Ringo Low & Assocs

(Civil Application No: W-02(NCVC)(W)-243-01-2013)

For the appellant - Ringo Low (Ting Lee Ping with him); M/s Ringo Low & Assocs

For the respondent - K Murali; M/s S N Nair & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-415-2011]

Reported by Amutha Suppayah

JUDGMENT

Mah Weng Kwai JCA:

Brief Facts

[1] By consent of the parties, the appeals in Kes Rayuan Sivil No: W-02(NCVC)(W)-318-02-2013 and in Kes Rayuan Sivil No: W-02(NCVC)(W)-243-01-2013 were heard together. In the former case the appellant is Great Eastern Life Assurance Malaysia Bhd (GE) and the respondents are Siu Yan Tam (Tam) and Collin Swee Lay Keong (Collin) while in the latter the appellant is Collin and the respondent is Tam. For ease of reference, the parties in these two appeals will be referred to by name.

[2] On 20 May 1998, the late James Swee Lee Kong (the deceased) purchased an insurance policy from GE (the policy) on 20 May 1998. The policy was known as Livin' Care-Whole Life Living Assurance with cash bonus policy.

[3] Tam, the widow of the deceased was named as the original nominee of the policy.

[4] The deceased executed his last will and testament on 25 May 2009 (the will) and appointed his brother Collin as the executor and trustee of the will. The deceased's two sons Jonathan and Jeremy Swee are the only two beneficiaries under the Will while Tam was excluded from the will. The policy was listed as an asset in the will.

[5] On 13 March 2010, the deceased fell ill with acute myeloid leukemia and was admitted to hospital. The illness is a 'major illness' defined under the policy.

[6] A day after his discharge from hospital, the deceased on 12 April 2010 appointed Collin as the co-trustee of the policy *vide* the appointment/change of trustee(s) form and substituted his two sons as the new nominees in place of Tam *vide* the appointment/change of nominee(s) form (the change of trustee form and change of nominees form).

[7] On 28 April 2010, the deceased made a claim on his policy arising from his illness and signed the Living Assurance Claim Form (LAC form) and an authorisation letter in favour of one Deborah Chor, Collin's wife. The LAC form and a confidential medical report dated 10 May 2010 prepared by one Dr Ng Soo Chin in support were submitted by Collin and received by GE on 17 May 2010.

[8] Earlier, Collin had on 5 May 2010 submitted the change of trustee form and the change of nominees form and the authorisation letter to GE for their record. The changes were duly endorsed by GE on 26 May 2010.

[9] The deceased passed away on 29 May 2010.

[10] On 2 June 2010, Tam instructed her previous solicitors to write and notify GE of the death of the deceased.

[11] The deceased's Living Assurance Claim was duly processed and approved by GE and on 16 June 2010, notwithstanding the notification of the death of the deceased, GE issued a cheque dated 16 June 2010 for the sum of RM268,248.66 being the benefits under the policy payable in the name of the deceased.

[12] On 18 June 2010, Collin as trustee of the policy and as executor and trustee of the will collected the cheque from GE without the knowledge of Tam. However, instead of clearing the cheque and crediting the benefits towards the assets of the estate of the deceased or of paying to the deceased's two sons, Collin utilised the money purportedly to reimburse himself for the medical expenses incurred by him on behalf of the deceased after the deceased was taken ill.

[13] On 24 May 2011, Tam filed the writ of summons and statement of claim against GE, Collin and one Cedric Miranda, the solicitor who was said to have witnessed the deceased signing the change of trustee form and the change of nominees form on 12 April 2010 at Glenmarie Golf Club, Shah Alam, Selangor.

[14] In short, Tam was claiming for the benefits of the policy and damages from GE for having negligently issued the cheque in the name of the deceased and against Collin for having forged the change of trustee form and the change of nominees form and the LAC form with the assistance of Cedric Miranda and fraudulently submitting the claim to GE.

[15] On 14 September 2011, GE issued a notice of indemnity and contribution to Collin to claim for indemnity and contribution in the event GE was held liable to Tam.

Tam's Claim In Negligence

[16] Tam's claim against GE was based on negligence in that:

(a) GE did not exercise its duty of care reasonably when it processed the LAC form to protect the interests of Tam and the deceased;

(b) as GE had been notified of the death of the deceased, GE ought to have issued the cheque payable to the estate of the deceased and not in the personal name of the deceased; and

(c) GE ought not to have handed the cheque to Collin thereby causing payment to the wrong party.

A **Defence Of GE**

[17] GE's defence to the claim of negligence was as follows:

(a) GE was not liable to Tam as Tam was not entitled to receive any benefits or had any interest to be protected under the
B policy, having been removed as the original nominee and as such she has not suffered any loss;

(b) GE did not owe a duty of care to Tam to investigate the LAC form and cannot be held by Tam to be negligent;
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(c) The policy benefits were properly paid out under the Living Assurance Claim in accordance with the terms of the policy;

(d) The cheque was properly handed to Collin as he was a co-trustee of the policy;
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(e) The loss, if any, suffered by Tam was not caused by GE; and

(f) In the event GE was held liable to Tam in negligence, GE sought an indemnity and/or contribution from Collin.

E **Decision Of The High Court**

[18] After a full trial that lasted nine days, the learned trial judge came to the following conclusions and made the following orders:

F (a) that GE was negligent when it issued the cheque for the benefits under the policy in respect of the Living Assurance Claim in the name of the deceased on 16 June 2010 after it had been notified on 9 June 2010 that the deceased had passed away on the 29 May 2010;
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(b) GE was ordered to pay the sum of RM268,248.66 being the benefits under the policy together with interest and costs to Tam;

(c) GE was successful in proving contributory negligence against
H Collin and pursuant to the notice of indemnity and contribution issued by GE, Collin was held 50% liable and was ordered to pay half of the amount ordered against GE; and

(d) there was insufficient evidence adduced to prove fraud and
I forgery against Collin and Cedric Miranda. Tam's claim against Collin and Cedric Miranda was accordingly dismissed.

Appeal To The Court Of Appeal

[19] Being dissatisfied with the orders of the learned trial judge made on 27 December 2012, both GE and Collin appealed against the said orders. Specifically, GE appealed against the order holding it liable in negligence towards Tam and the order holding Collin to be 50% contributorily negligent only on the notice of indemnity and contribution issued by GE.

[20] Collin in turn, appealed against the decision ordering him to pay half of the judgment sum together with interest and costs made against GE.

[21] It will be important to note that there was no cross appeal by Tam against the decision of the learned trial judge dismissing the claim of fraud and forgery made against Collin and Cedric Miranda.

Decision Of The Court Of Appeal

[22] Upon reading the records of appeal, the written submissions of counsel of GE, Collin and Tam and upon hearing the oral submissions of counsel aforesaid and upon a careful evaluation of the evidence adduced, the court unanimously decided to allow both the appeals with no order as to costs. The orders of the High Court in paras. 23(i), (ii) and (iii) were accordingly set aside. Further the court, on an oral application by counsel for GE made an ancillary order directing Tam to refund the sum of RM332,866.23 to GE paid under the High Court order, within thirty days of the decision of the Court of Appeal, without having to wait for the extraction of the sealed order.

[23] Being dissatisfied with the decision of the court, Tam now applies for leave to appeal to the Federal Court.

Main Issues For Determination By The Court Of Appeal

[24] In these two appeals before the court, the main issues for determination were as follows:

(i) whether Tam had any *locus standi* to commence the action against GE and/or Collin;

(ii) whether GE was negligent in issuing the cheque in the name of the deceased and handing the cheque to Collin; and

(iii) whether Collin was to be held 50% liable only for contributory negligence on the notice of indemnity and contribution issued by GE.

Grounds Of Decision

[25] Counsel for Tam in his written submission raised a preliminary objection of no case to answer in the appeal by Collin. It was contended by counsel that as Collin's appeal was only against the order of indemnity and contribution in respect of the notice by GE it had nothing to do with Tam's claim of fraud, forgery and/or falsification of the signature of the deceased against Collin which had been dismissed after trial. As such, there was nothing for Tam to respond to in Collin's appeal.

[26] In our judgment we are of the view, however, that it was quite in order for Collin to have filed his appeal against the order for indemnity and contribution made against him as it was made as a result of Tam's claim of negligence against GE in the first instance. Accordingly, the court is of the view that Tam ought to respond to Collin's appeal. To have allowed the preliminary objection would have meant the court taking a very simplistic approach and skirting the issue as it cannot be disputed that the two appeals are interlinked with issues common to both appeals which had to be determined holistically.

[27] The starting point in the consideration of these two appeals was to determine whether Collin was guilty of forgery and falsification of the signature of the deceased on the change of trustee form and the change of nominees form as well as the LAC form and whether Collin was guilty of fraud when he submitted the said forms to GE for processing and payment.

[28] It is important to bear in mind that the learned trial Judge came to the conclusion as a matter of fact and law that there was insufficient evidence to conclude that Collin had committed fraud, forgery and falsification of the deceased's signature. The learned trial Judge in paras. 16 and 17 of his grounds of judgment (Rekod Rayuan Jilid 1 pp. 53-54) held:

> As for the allegation of forgery, while this court is not satisfied with the expert opinion of Lim Yok Chow (PW9), the forensic document examiner and find his opinion not to be conclusive that the signature of the assured-deceased has been forged ...

> ... Therefore, it is improper and not safe to accept the opinion of En Lim Yok Chow as conclusive of the forgery.
>
> As against the third defendant there is insufficient evidence to find that he had committed fraud, forgery and falsification of the deceased's signature ... Accordingly, a claim against the third defendant for fraud, forgery and falsification of the signature cannot be sustained in law.

[29] It is equally important to note that Tam has not cross appealed against the decision of the learned trial judge when concluding that Collin was not guilty of fraud, forgery and falsification of the deceased's signature.

[30] The nett effect and consequences of that finding are that the following must be accepted as having been established in evidence and proved, on the balance of probabilities, namely that:

(a) the change of trustee form must have been validly signed by the deceased on 12 April 2010;

(b) Collin was validly appointed as co-trustee of the policy;

(c) similarly, the change of nominees form must have been validly signed by the deceased on 12 April 2010;

(d) the deceased's two sons, Jonathan and Jeremy Swee were validly appointed as nominees in substitution of Tam;

(e) the LAC form must have been validly signed by the deceased on 28 April 2010; and

(f) the deceased's claim was a valid Living Assurance Claim made pursuant to the deceased's illness, for the benefits under the policy and was not a death claim.

[31] The above consequences are the direct result of the finding made by the learned trial judge that there was insufficient evidence to find Collin guilty of fraud, forgery or falsification of the deceased's signature. In the absence of any appeal by Tam that the learned trial judge had erred in not finding Collin guilty of fraud or forgery, it is not open to this court in its appellate jurisdiction to countenance otherwise. Thus, it is not incumbent upon this court to examine the circumstances in detail how the change of trustee form, change of nominees form and the LAC form were signed by the deceased on the respective dates.

[32] With respect, we are of the view that it was contradictory for the learned trial judge to say in his grounds of judgment that while fraud and forgery had not been proven conclusively against Collin, yet it was proved on a balance of probabilities that the change of trustee form and the change of nominees form were not signed by the deceased on 12 April 2010 on the ground that he was too ill to have done so. The question then that begs for an answer is who did in fact sign the two change forms if they were neither forged by Collin nor signed by the deceased. In our judgment, we are of the view that Tam had failed to prove on a balance of probabilities that the two change forms were invalid.

[33] Another important factor to be considered at the outset of these two appeals was that the claim was made by the deceased when he was still alive as a Living Assurance Claim for the benefits payable under the policy to himself arising from the major illness afflicting him. Basically, it was a medical claim of the deceased by submitting the LAC form supported by the medical report of Dr Ng Soo Chin. In a Living Assurance Claim the benefits are to be paid to the deceased as the insured and not to the nominee. It must be noted and borne in mind that the deceased's claim was not a 'Death Claim' that is, a claim arising as a result of the death of the deceased where the benefits of the policy would be paid to the nominee of the policy.

[34] Upon GE receiving the LAC form and the supporting documents on behalf of the deceased, GE processed the claim and was satisfied that it was proper to make a pay out of the benefits to the deceased immediately, as per the terms and conditions of the policy. Ms Lim (DW1(D1)) on behalf of GE had testified that it was proper for GE to admit the claim notwithstanding the LAC form was a photocopy only. It was regarded by GE as being as valid as the original copy. Hence, the cheque was drawn in favour of the deceased and Collin allowed to collect it on 18 June 2010.

[35] The court accepted the evidence of the witness for GE who explained that the Living Assurance Claim submitted on behalf of the deceased during his lifetime did not "convert" to a death claim just because payment of the benefits under the policy was made only after the deceased had passed away and that the deceased could not have possibly used the benefits personally. The deciding factor in point of time was when the Living Assurance Claim was made and not when the benefits were paid out (refer to the

evidence of DW2(D1) in Rekod Rayuan 2(5) pp. 1087-1088 QA 9 or Core Bundle pp. 98-99). The fact that GE was informed of the death of the deceased before payment of the benefits did not change the character and nature of the Living Assurance Claim which was a claim payable upon confirmation of a specified illness. It was not in dispute that the deceased was indeed diagnosed as suffering from acute myeloid leukemia as set out in the medical report of Dr Ng Soo Chin. In a claim for major illness the "beneficiary" of the benefits of the policy was the deceased himself and not Tam as the original nominee or the deceased's sons as the substituted nominees or the estate of the deceased. In any event, pursuant to s. 166(2) of the Insurance Act 1996, the policy monies shall not form part of the estate of the deceased.

Issue 1 - Whether Tam Had Any Locus Standi To Commence The Action Against GE And Collin

[36] For Tam to have any *locus*, it must have been on the basis that she was at all material times, the original nominee of the policy and no more. Hence, it was pivotal for Tam to establish and prove that she was still the lawful nominee of the policy at the time of death of the deceased notwithstanding the change of nominees form submitted on behalf of the deceased, wherein Tam was substituted by the deceased's (and Tam's) two sons, Jonathan and Jeremy Swee as nominees. The change of nominees form was received and accepted by GE and recorded accordingly. The fact that the change of nominees form was not forged or falsified by Collin (or by anyone else for that matter) was determined by the learned trial judge after a full trial and there is no cross appeal against this finding by Tam. Surely then, since Tam had been removed as the nominee, she could not have any basis or *locus* at all to commence this action against GE and Collin. Further, whether or not Collin was properly and/or lawfully appointed as a co-trustee of the policy was of no consequence to Tam as she had been removed as the original nominee by the deceased. The fact that Tam had been removed as a nominee came as no surprise as the marriage between the deceased and Tam had irretrievably broken down by March 2010.

[37] Also, it will be noted that Tam has no *locus* to commence this suit against GE and Collin, even as a beneficiary of the estate of the deceased as she had been expressly excluded from the Will by the deceased. It was an agreed fact that Tam was not a named beneficiary under the Will.

[38] The court is of the view that even if GE was negligent in accepting the LAC form as being valid when the deceased could not have possibly signed the LAC form, Tam who was no longer the nominee of the policy, would not have been entitled to any of the benefits under the policy. Rightly, Collin should have held the benefits of the policy in trust for the deceased's sons as being the substituted nominees. Accordingly, Tam cannot be said to have suffered any loss and has no *locus* to claim for any. (See *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64).

[39] To say the least, we are of the view that the learned trial judge was ambivalent when he first held that Tam did not have *locus* but later held that on the whole Tam did have *locus* to sue.

[40] The court is mindful of the provisions of the Insurance Act 1996 which allow for the revocation of an appointment of a nominee and for another nominee to be appointed *in lieu*. Further there is no requirement on the part of an insurance company to inform a nominee who has been removed of his or her removal.

Issue 2 - Whether GE Was Negligent In Issuing The Cheque In The Name Of The Deceased And Handing The Cheque To Collin

[41] In the event it is held that Tam did have the *locus* to commence this suit, then the next issue to be determined was whether GE was negligent in issuing the cheque in the name of the deceased after the deceased had passed away and handing over the cheque to Collin.

[42] It was Tam's case that the LAC form was invalid as it was forged or falsified, not that it was invalid for any other reason or cause and that GE was negligent when "investigating" the LAC form before it made payment. It was not Tam's case that she had made a death claim which GE had wrongly rejected.

[43] In our judgment we are of the view that the Living Assurance Claim was properly submitted in accordance with the terms of the policy admitted and paid by GE pursuant to Endorsement No. 51 of the policy. Endorsement No. 51, in part provides as follows:

ENDORSEMENT NO. 51 (LAP)

1. DEFINITIONS

"Living Benefit" shall mean the Basic Sum Assured shown in the Schedule hereto, subject always to Section II below, plus any reversionary and any terminal bonuses which would have been payable had the Life Assured died on the day that he was diagnosed by a Medical Practitioner, and where applicable, Medical Practitioner appointed by the Company, as suffering from a Major Illness.

CONDITIONS

In addition and without prejudice to any other provision of this Endorsement, the Company shall not have any obligation or liability under this Endorsement unless all of the following conditions are satisfied:

(1) After the Life Assured suffers from a Major Illness, the Company must be notified immediately or as soon as it is practicable; otherwise the Company shall not be liable in respect of the Major Illness.

(2) The Major Illness must be diagnosed by a Medical Practitioner and must be supported by clinical, radiological, histological and laboratory evidence acceptable to the Company; all such medical evidence must be furnished at the Life Assured's expense.

(3) If required by the Company, the Life Assured must undergo medical examination by the Medical Practitioner appointed by the Company in connection with the Major Illness for which a claim has been made.

(4) The aggregate amount of sum assured payable by the Company shall not exceed RM500,000 under this and all Living Assurance Policies and Living Assurance Term Life Riders or provisions for similar major illnesses on the same life.

EXCEPTIONS

(1) No benefits under this Endorsement shall be payable if the Major Illness existed at the date of issue of the Policy of this Endorsement or at the date of any reinstatement.

(2) No benefits under this Endorsement shall be payable for any Major Illness resulting directly or indirectly from self-inflicted injuries, while sane or insane.

DISCONTINUANCE

This Policy shall terminate once a claim under this Endorsement, with the exception of any claim in respect of any of the Major Illnesses in Section III (35) above, is admitted.

This Endorsement is cancelled once the Policy is converted into an extended term assurance.

[44] It was not in dispute that GE was obliged to pay the deceased on the Living Assurance Claim during his lifetime since the deceased was diagnosed with a major illness. Payment on the Living Assurance Claim was not dependent on whether the change of trustee form or the change of nominees form were properly effected. The truth of the matter is that the Living Assurance Claim was submitted by the deceased when he was alive and payment was to have been made to him in his name and not to his nominee or estate notwithstanding that GE had been informed of the deceased's death on 9 June 2010. To reiterate, it must be emphasised that it was a "living claim" and not a "death claim" in this case.

[45] However, a distinction is made and it must be pointed out that it was not a term or condition within Endorsement No 51 that the payment of the benefits of the policy under the Living Assurance Claim can only be paid out when the deceased was still alive and not after his death. There is no provision within the policy which stipulates that after a Living Assurance Claim has been properly submitted and if death of the assured follows, the Living Assurance Claim will be converted to a death claim, rendering the Living Assurance Claim invalid.

[46] The court is of the view that with respect the learned trial Judge was thus in error when he held:

> the third defendant the trustee, has no authority or locus to receive the payment under the living assurance claim which rightfully or legally ought to have been paid to the assured during his lifetime and not after his death.

[47] The court is also of the view that nothing much turns on the fact that the LAC form that was submitted was a photocopy containing correction fluid marks. This is so because the primary evidence of the deceased's major illness was the medical report which was in good order and not the LAC form. If GE did not have any basis to doubt the veracity of the LAC form, we see no reason for allowing Tam to do so. In any event, it was not the pleaded case of Tam that GE was negligent in accepting a photocopy of the LAC form with blanco marks.

[48] It follows therefore in the judgment of this court that GE did not owe any duty of care to Tam when "investigating" the LAC form and there is no substance in law to support a contention that Tam has suffered any loss in the circumstances. (See *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389).

[49] Accordingly the learned trial judge was plainly wrong when he went on to hold that:

> Accordingly and even on the assumption that the Notice of Change of Nominee and an appointment of additional Trustee was in fact signed by the assured deceased, the entire insurance claim should have resulted in favour of the nominee or the least in the trustee for the benefit of the assured's two children, namely Jonathan Swee Teck Jeanne and Jeremy Swee Teck Heanne. In any event and naturally the plaintiff who was the lawful widow of the insured-deceased and the nominee to the insurance claim since 1998 and the mother of the two named beneficiaries would be interested to know the status of the insurance money as she was always under the belief that she was the nominee to the insurance policy …

[50] In essence Tam's complaint was that by the time GE issued the cheque, it had already been notified of the death of the deceased (on 29 May 2010) by way of the letter of Tam's previous solicitor dated 9 June 2010, and that the cheque should not have been drawn in the name of the deceased.

[51] We are of the view that GE was not negligent in issuing the cheque in the name of the deceased since this was a Living Assurance Claim and not a death claim. Payment in respect of a Living Assurance Claim must be in the name of the assured, regardless of whether he was living at the time of payment. The

notification of the death by Tam's previous solicitor did not invalidate or extinguish the Living Assurance Claim and convert it to a death claim.

[52] Be that as it may, that GE should want to issue a cheque in the name of a deceased person, did not change the position that GE was not obliged to issue the cheque in the name of Tam as the original nominee or in the names of the deceased's two sons as substituted nominees as the claim was a Living Assurance Claim submitted during the lifetime of the deceased.

[53] By not issuing the cheque in the name of the estate of the deceased, again Tam would not have suffered any loss as she was not entitled to receive any part of the benefits as a beneficiary under the Will.

[54] It was *Tam*'s case that the LAC form, a photocopy, was amended, tampered with, incomplete and not signed by the deceased and ought to have been rejected outright by GE after it was submitted by Collin on 17 May 2010. Taking for a moment that the LAC form was not a valid claim, the next issue to be determined was still the status of Tam under the policy. Without a Living Assurance Claim being made and upon the death of the deceased, Tam would have seemingly been in a position to make a death claim. But to do so Tam would have to overcome the issue of her removal as the original nominee. In light of the findings already arrived at above by the court, we are of the view that Tam would most probably not have been successful in making the death claim. In such a situation it would appear that the deceased's two sons may have been in a position to make the death claim. At the expense of repetition, it must be remembered that if a death claim had been submitted it would have been necessary for GE to process the claim as such. There would have been no question of the Living Assurance Claim being converted to a death claim as the Living Assurance Claim would have been rejected by GE.

[55] With respect, the learned trial judge failed to properly and judicially evaluate the evidence adduced in court thereby warranting appellate intervention in this case. The learned trial judge failed to accept the evidence of DW2 (D1) Ms Thong Wai Yin, the Vice President of GE, claims department who testified that GE "was not obliged to investigate the living claim let alone to protect the interest of the plaintiff (Tam) who was no longer a

nominee by 26 May 2010 when the company recognised the change of nominees". There was nothing on the LAC form, which was properly supported by the required documents, to suggest any impropriety or to raise any suspicion when GE was processing the claim. The LAC form which appeared regular on its face was evidence which was completely ignored by the learned trial judge. The LAC form was for the purpose of a medical claim and was not as if the deceased was seeking to change the name or ownership of the policy.

[56] It was Tam's case that GE was negligent in handing the cheque to Collin and not to Deborah Choa (his wife) who was named in the letter of authorisation dated 28 April 2010 by the deceased as the person authorised to collect the cheque from GE. It appears that there was no good reason for GE not to have handed the cheque to Deborah and the court agrees with the contention of counsel for Tam that GE had failed to comply with the direction of the deceased. Further the court does not accept the proposition by Collin that he, as a trustee, was in "higher authority" than Deborah to collect the cheque. However, the court is of the view that there was no loss occasioned by GE's decision as Deborah, if she had collected the cheque would still have to hand it over to Collin as trustee.

Issue 3 - Whether Collin Was To Be Held 50% Liable Only For Contributory Negligence On The Notice Of Indemnity And Contribution By GE

[57] The short answer to this issue was that Collin cannot be held contributorily negligent at all since it was the decision of this court that GE was not liable to Tam in negligence in the first instance. There is thus no question of any indemnity or contribution to be made against Collin.

Conclusion

[58] In the result, the court allowed both the appeals with no order as to costs as it was unanimously decided that GE cannot be held liable in negligence to Tam and that there is no issue of any indemnity or contribution due from Collin.

[59] It is unfortunate that Collin had utilised the benefits of the policy personally, purportedly to reimburse himself for the medical expenses incurred on behalf of the deceased. By doing so Collin has deprived the estate of the deceased from obtaining the

A benefits of the policy and thus depriving the deceased's two sons from enjoying the assets as beneficiaries. The beneficiaries may perhaps consider filing a claim against Collin but that course of action will be for another day.

B **[60]** In closing, the court wishes to express its view that GE on becoming aware of a claim by Tam ought to have filed interpleader proceedings to determine the payment of the benefits of the policy to the rightful party. This course of action may have pre-empted any payment to Collin and would have avoided a lengthy trial that C lasted nine days.

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